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Justice Macpherson, who heard the case of *Kedar Nath Dutt* in the Original Court. There the transaction, according to the view taken by the Appellate Court, was not completed till the debtor in that case executed the note of hand, but in this case the execution of the note of hand preceded the deposit of the title deeds, and the letter of deposit was written about two hours after. That being so we think that in this case the transaction was completed before the letter of deposit was written. Upon both these grounds we agree with the learned Recorder in the answers to be given to the questions submitted to us. But with reference to the second question we desire to say that we by no means endorse his view that the plaintiffs would be entitled to a conveyance to them of the legal estate. This question has not been referred to us, but if it were, we should be inclined to hold that the proper remedy is by sale of the mortgaged property.

The record will be returned to the lower Court, and under s. 57 of Act XVII of 1875 the costs of this reference shall be considered as costs in the suit.

K. M. C.

APPELLATE CIVIL.

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July 26.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

HIRA LAL CHATTERJI (PLAINTIFF) *v.* GOURMONI DEBI (DEFENDANT).*

Civil Procedure Code, 1882, *s.* 244—*Suit to recover purchase money on reversal of decree under which Sale in Execution took place—Separate suit—Party to proceedings in execution.*

G instituted a suit against *H*, *C* and *P*, which was dismissed with costs, but an appeal was preferred. Pending the appeal, however, *C* took out execution of the decree for costs, and brought to sale a house belonging to *G* of which *H* became the purchaser, paid the purchase money, and got possession. Subsequently the decision dismissing the suit was reversed on appeal, and the defendants in that suit were ordered to pay a certain sum to *G* with costs. *G* then applied for restitution of her house which had been sold under the decree reversed, and eventually obtained an unconditional order for possession, *H* being left to any remedy open to

* Appeal from Original Decree No. 530 of 1885, against the decree of Baboo Sharoda Prosad Chatterji, Rai Bahadur, Subordinate Judge of Hooghly, dated the 8th of September 1885.

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him in respect of the purchase money. *G* having obtained possession of the house, *H* brought a suit against her to recover the purchase money: *Held*, that notwithstanding s. 244 of the Civil Procedure Code, he was entitled in this suit to recover the purchase money, as money received to his use, the consideration for it having failed. *H* was not, in his character as an auction purchaser, a party to the execution proceedings, and for the purpose of the suit was to be treated as a third person.

THE facts of this case were that the defendant Gourmoni had, on the death of her daughter-in-law, succeeded to the estate of her son Jodu Nath Chatterji, and instituted a suit against Hira Lal Chatterji the present plaintiff, and two other persons, Charu and Petambur, to recover two Government promissory notes belonging to that estate, which she alleged were being withheld from her by fraud. That suit was, in the first Court, dismissed with costs, but on appeal that decision was reversed, and the three defendants were directed to pay her the sum of Rs. 2,500 with costs. Before the decision in appeal, however, the defendant Charu took out execution of the decree of the first Court for costs, and brought to sale a house belonging to Gourmoni, of which the present plaintiff Hira Lal became the purchaser. After the reversal of the first Court's decision on appeal, Gourmoni applied for restitution of her property which had been sold under the decree reversed, and eventually obtained an unconditional order for possession of the house, Hira Lal being left to any remedy open to him in respect of the purchase money. Gourmoni having obtained possession of the house, Hira Lal brought this suit against her to recover the purchase money with interest, and the costs of certain improvements made while it was in his possession.

The main defence was that the plaintiff had no cause of action, and that the suit was not maintainable with respect to s. 244 of the Civil Procedure Code, the purchase money being only recoverable in the execution proceedings.

The lower Court found that the suit was not unsustainable on that ground, but that equitably the plaintiff was not entitled to recover the purchase money; he therefore dismissed the suit.

The plaintiff appealed to the High Court.

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Baboo *Nil Madhab Bose* for the appellant.

Dr. *Guru Das Banerjee*, and Baboo *Boidyo Nath Dutt*, for the respondent.

The following judgments were delivered by the Court (PETHERAM, C.J. and GHOSE, J.)

PETHERAM, C.J.—This is a suit which has been brought by the plaintiff against the defendant to recover a sum of Rs. 2,750 and interest, and various other sums. The lower Court has dismissed the suit altogether, and so the matter comes before us now in appeal.

The facts of the case are that, some time ago, the present defendant brought a suit against the present plaintiff, and two other persons, to recover a certain sum of money. It is immaterial to enquire what that suit was about. The Court of first instance dismissed that suit with costs, which amounted to Rs. 300 and odd. The plaintiff in that suit appealed from that decision, and while the appeal was pending the defendants in that suit sued out execution of their decree for costs, and in the execution proceedings the house, in which the then plaintiff was living, was sold and purchased by the present plaintiff, one of the defendants in that suit, for Rs. 2,750. Out of that amount the costs, on account of which the execution had been taken out, were satisfied, and the balance, amounting to Rs. 2,429, was paid into Court, whereupon the plaintiff (the present defendant) applied to have that amount paid out to her, and that was accordingly done.

The state of things, therefore, was this; that the house had passed into the hands of the auction-purchaser, who happened to be also the execution-creditor, the costs for which execution had been issued was satisfied, and the balance of the purchase money, the Rs. 2,429, had passed into the hands of the plaintiff in that suit, that is, of the person whose house it was that had been sold.

That being the state of things, the next thing that happened was, that the appeal, which had been preferred by the then plaintiff, came on for hearing. The Appellate Court was of opinion that the decree under which the house had been sold

was wrong, and that there ought to have been a decree in favor of the then plaintiff. The Judge, therefore, set aside that decree and decreed the plaintiff's suit, and consequently that decree being gone, the sale was gone too, and had to be got rid of in some form or other.

It being borne in mind that the person who had purchased the house in execution was one of the defendants, and consequently a party to the cause, an application was made by the now defendant, who was the plaintiff in that suit, under the provisions of the Code of Civil Procedure, for restitution of her property. This application appears to have been resisted by the auction-purchaser, to this extent, that he stated that, if the house were restored to the plaintiff, the purchase money should be refunded to him. It is true that this does not appear directly, but the owner of the house having, in that proceeding, objected to return the money, it may be inferred that the person who had paid the money had made some such objection as that.

However that may be, the Judge before whom the matter came, seems to have held that, as between the parties to the suit he was entitled to order the restitution of the house because the decree had been set aside, but that he was not in a position to say that, if that were so, the money should be paid back as well. But whether he came to that conclusion or not, at all events he refused to make the order that the money should be returned to the purchaser, although he ordered that the house should be re-conveyed to the plaintiff in that suit by her.

The state of things, therefore, now is, that the house having been re-conveyed by the purchaser to the then plaintiff, she remains in the position of having both the house and the money, which was paid as the consideration for it, and of which she applied to have her share paid out of Court to her, and which was so paid; and the question arises, whether, under such circumstances, the person who paid the money for the purchase of the house can recover it from her, the owner of the house, as money received to his use, the consideration for it having failed.

I am of opinion that he can. I think that the money was money which was paid by him into Court, in consideration that this particular house should be conveyed to him; and I think that

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when the owner of the house applied to the Court and took the money out, she in a manner confirmed the sale; as between herself and the purchaser she made the transaction her own; and, therefore, I think, that when she put the law in motion to cancel the sale and take the house back again, she placed herself in the position of a person having in her possession money which belonged to another, the consideration for which had failed and so came within the ordinary rule of law that a person under these circumstances can be made to refund the money to the person fairly entitled to it.

I think, therefore, that notwithstanding the provisions of the Code of Civil Procedure, which provide that all matters between parties to the execution proceedings shall be decided in the execution department, we are entitled to do justice and say that this money must be returned to the plaintiff, and a sufficient reason to give for that is that the plaintiff, in the character in which he appears in this suit, was not a party to the execution proceedings. His character, with reference to this transaction, was that he was an auction-purchaser. It is a mere accident that he was an auction-purchaser in a suit in which he was one of the parties. In this suit he must be treated as a third person. He is, therefore, I think, entitled to maintain this suit without reference to the provisions of s. 583 taken along with s. 244 of the Code of Civil Procedure.

Under these circumstances I am of opinion that the decree of the Court below must be varied by giving the plaintiff a decree for the sum of Rs. 2,429, with interest thereon at the rate of six per cent. per annum from the 15th March 1885 to this date. The costs will be in proportion to the amounts decreed and disallowed respectively.

GHOSE, J.—I agree to the decree which my lord proposes to pass in this case.

J. V. W. *Decree varied.*